untary alienation of his property by A. Again, it is a maxim of the law, *Sic utere tuo ut alienum non lædas*, 9 Rep. 59. Enjoy your own in such a way as not to injure that of another. And while the maxim undoubtedly refers to the use of another's *property*, the principle appears to be the same in regard to any right. Broom, Leg. Max., p. 394, says: "Where rights are such as, if exercised, conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the exercise of some duty imposed on him toward the other. Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law."

The right to vociferate, and to exercise a man's lungs, may be a right inalienable, and yet, if it injure his neighbors in one of *their* substantial rights, as, for instance, the right to peaceably assemble for public religious worship (*Kindred* v. *State*, 33 Tex. 69; *Brown* v. *State*, 46 Ala. 175), or for the purpose of a sale at auction (*Furness* v. *Anderson*, 1 Pa. Law Journ. Rep. 324), even that right may become a wrong. The *cause celebre* of *State* v. *Linkhan*, 69 N. Carolina 214, which seems to hold the contrary, is only to the effect that *the intention* to disturb and interfere must be apparent.

JAMES APPLETON MORGAN.

RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

JOSIAH CHAPIN *v.* LUCINDA JAMES ET. AL.

The Supreme Court of a state has no power to enjoin the United States marshal from proceeding to a sale on execution, although the property levied on is that of a stockholder in a corporation against which judgment and process of execution issued; the execution being levied by direction of attorneys thereon endorsed to enforce the stockholder's liability under the Rhode Island statute regulating manufacturing corporations.

Notwithstanding the issue of execution the case is pending, and unless otherwise regulated by statute the execution is still under the control of the court.

As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it.

As between courts of co-ordinate jurisdiction, the tribunal issuing process has exclusive control over it.

As between state courts and United States courts, neither can enjoin the process of the other.

Semble, that the limitations from citizenship imposed on the jurisdiction of United States courts do not apply to ancillary bills in equity or petitions to protect the rights of those interested in property in the custody of the court.

Semble, that such ancillary bills in equity or petitions, may be brought in the United States courts by any one whose interests are affected by the process.

BILL in equity. The defendant having obtained from the United States Circuit Court in a suit in equity, judgment against the Atlantic Delaine Company, took out her execution, and it was in pursuance of an order of her attorneys endorsed thereon, levied by the United States marshal on the property of the present complainant, Josiah Chapin, it being claimed that he was a stockholder in the said corporation at the time the liability accrued. and that she had the right so to levy it by the provisions of the statute of Rhode Island regulating manufacturing corporations.

The said Chapin having filed this bill for an injunction against the United States marshal, to restrain him from selling the property levied on, Mrs. James now moved that the bill be dismissed on the ground that the state court has no jurisdiction in the case.

James Tillinghast, Benjamin T. Eames and *Charles Hart*, for complainant.

J. H. Parsons and *Thomas A. Jenckes*, for respondents.

The opinion of the court was delivered by

POTTER, J.—The complainant contends that in the present case, so far as concerns the levy on real estate, the property cannot be considered as in possession of the United States court. That the complainant, Chapin, was not a party to the suit, and that even if he was liable as a stockholder, the marshal has no right, on an execution against the corporation, to levy the execution on his property, inasmuch as the mode of proceeding provided in the Manufacturing Corporations Act has never been adopted by any United States statutes or rule of court; that the execution was issued on a judgment in a suit for tort, whereas the stockholder is only liable in case of contract; that Mrs. James, being a stockholder herself, was not entitled to that process, and that there is no remedy for the complainant unless this court interferes.

The facts alleged being assumed as true for the purpose of deciding the present motion to dismiss, cannot the complainant raise in the United States Circuit Court all these and other questions of law he may make, and have them decided by that court?

Although a decree has been made in the suit in the United States Circuit Court, the case is still pending there. The execution is the process of the court for carrying its decree into effect, and

except so far as regulated by statute, is still within the court's control. Courts of law anciently by "audita querela" and on motion, and latterly more generally by motion, have exercised control over their final process, and courts of equity have always done so. This is absolutely necessary to prevent the execution of a judgment or decree in one suit giving rise to a dozen other suits growing out of questions as to the mode of serving its process. The suit is not ended by the judgment; it is still pending: *Wegman* v. *Childs*, 41 New York 159; *Mann* v. *Blount*, 65 N. C. 99, 101; *Howell et al.* v. *Bowers*, 2 Cr., M. & R. 621; *Spann et al.* v. *Spann*, 2 Hill's S. C. Ch. 156. So far as the present controversy is concerned, the question is between courts of co-ordinate jurisdiction. The suit was in equity, and might have been brought either in the United States or in the state court; and it is a principle too well settled to need authority that in such case the court which first acquires jurisdiction is to retain it, and is not to be interfered with by any other co-ordinate court, and that property in possession of the officers of the court is in possession of the court, and cannot be levied on by officers under authority of any other court of co-ordinate jurisdiction, whether state or Federal: *Hagan* v. *Lucas*, 10 Peters 400; *Wallace* v. *McConnell*, 13 Id. 136; *Smith* v. *McIver*, 9 Wheat. 532; *Mallett* v. *Dexter*, 1 Curtis 178; *Buck* v. *Colbath*, 3 Wall. 334, 341. Says Mr. Justice McLEAN, in *Hagan* v. *Lucas*: "A most injurious conflict of jurisdiction would be likely often to arise between the Federal and the state courts, if the final process of the one could be levied on ptoperty which had been taken by process of the other." In that case the United States marshal had levied on property previously attached by the state sheriff.

And see, also, the remarks of Judge GRIER on the jurisdiction of the Federal and state courts in *Ex parte Jenkins*, 2 Wall. Jr. 521–525. And as between state and United States courts, it is well settled that as a general rule neither can enjoin the process of the other. In case of conflict of jurisdiction as to cases arising under the United States Constitution or laws, the Supreme Court of the United States at Washington is the final arbiter: *Diggs* v. *Walcott*, 4 Cranch 179; *McKim* v. *Voorhies*, 7 Cranch 279; *Peck* v. *Jenness*, 7 How. 612–625; *City Bank* v. *Skellton*, 2 Blatch. 26; *Brooks* v. *Montgomery*, 23 La. Ann. 450; and see *Kendall* v. *Winsor*, 6 R. I. 453; *Coster* v. *Griswold*, 4 Edw. Ch. 364–377; *English et al.* v. *Millar et als.*, 2 Rich. S. C. Eq. 320;

and so as to a court of a sister state: *Mead* v. *Merritt*, 2 Paige 402–404; 2 Story on Const. (ed. of Cooley), § 1757; Story Eq. Juris. § 900; Conklin's U. S. Courts, 162–272 (4th ed. 1864); Conklin's U. S. Courts 176, 296 (5th ed. 1870); and see the very strong expressions of the majority of the Supreme Court of the United States, in *Taylor* v. *Carryl*, 20 How. 583, 596.

But it is said by the complainant that in this case an execution issued against A. has been levied on B.'s property, and that in such a case a state court may interfere; and he cites 1 Kent Comment. 410, supported by *Cropper* v. *Coburn*, 2 Curtis 465; *Greene* v. *Briggs*, 1 Id. 311. The latter was the case of liquor seized by an officer under a state law which said Greene replevied out of the possession of the state officer on a writ brought to the United States Circuit Court. In that case the question of jurisdiction was not raised.

Judge KENT cites as his authority *Bruen* v. *Ogden*, 6 Halst. N. J. 370, which was a case of replevin, and *Dunn* v. *Vail*, 7 La. Term R. 416, 3 Martin, La. 602, which latter was an action of trespass where there could be no actual conflict of jurisdiction, and therefore is no authority for us.

The doctrine contended for by complainant was also held by the Supreme Judicial Court of Massachusetts in a replevin case: *Howe* v. *Freeman*, 14 Gray 566. But this case was carried up to the Supreme Court of the United States and there reversed: *Freeman* v. *Howe*, 24 Howard 450, 457; where the opinion was delivered by NELSON, J., one of the oldest and most learned and experienced justices of that court. This case, as observed by Mr. Justice MILLER, 3 Wall. 341, took the profession by surprise, as overruling the decision of the Supreme Judicial Court of Massachusetts and the opinion of Chancellor KENT. But it was upon this very point expressly affirmed by the United States Supreme Court in *Buck* v. *Colbath*, 3 Wall. 334, 341. It is said that the marshal on execution against A. has no right to levy on the property of B., which is claimed to be the present case. The very point decided in these two latter cases was that in such a case the court from which the process issues must of necessity decide the question, and the case of *Brooks* v. *Montgomery*, 23 La. Ann. 450, is exactly in point. The decision there was that the state court would not enjoin the United States marshal from selling property, on the ground that the property was not the property

of the defendant in the original suit, but of the person who applies for the injunction. It is asked if the marshal, on a writ against A. should arrest B., would not the state court grant relief? We think in that case the application should be to the court whose process is abused. Suppose, for instance, a case of disputed identity. The court issuing the process could decide it, and it could only lead to an unseemly conflict for another court to interfere.

It is to be observed that there is a great distinction between actions of replevin and injunctions which actually interfere with the process of a court, and actions of trespass and case where damages only are claimed against an officer, in which latter there is no danger of conflict, and which may be peaceably taken from the state court to the United States Supreme Court, whose decision is final: *Buck* v. *Colbath*, 3 Wall. 334, 343, 347.

It is argued that in actions of trespass and case the claimant only recovers damages, whereas he ought to be protected in the possession of the property itself. The same argument was urged in *Freeman* v. *Howe*, and was overruled.

It is said that here Chapin was not a party to the original suit, but was a stranger to it, and could have no remedy in the United States Circuit Court, growing out of the peculiar limitations on their jurisdiction over parties.

In a state court, and so also in the United States court, but for the limitation as to citizenship there can be no doubt that even a stranger who had suffered from the execution of a decree might obtain relief by petition to the court for an order in the case: 1 Hoff. Chanc. Prac. 89; *Platto* v. *Deuster*, 22 Wis. 482, 485, citing *McChord's Heirs* v. *McClintock*, 5 Littell, Ky. 304, where a person, not a party to a suit, who had been turned out of possession on the execution, was relieved by petition in the same suit. See also *Dyckman* v. *Kernochan*, 2 Paige 26; *Spann et al.* v. *Spann*, 2 Hill S. C. Chanc. 156; *Lane* v. *Clark*, 1 Clarke (N. Y.) Ch. 307–9. And as to the United States courts, it seems to be settled by the case of *Freeman* v. *Howe*, 24 How. 450, 460, that where the process was in a suit at law, a bill on the equity side of the court would lie to regulate or restrain proceedings, and that such a bill would be not original but ancillary, and might be brought by any one whose interests were affected by the process. And while limiting the relief to parties before the court, or who may come before it, the same court, by Mr. Justice MILLER, in

Buck v. *Colbath*, 3 Wall. 334, 344, laid down the same rule, viz., that persons interested in the possession of the property in custody of the court may by petition make themselves so far parties as to have their interests protected, although, if it was an original suit, the qualifications as to citizenship would not be such as to give the federal courts jurisdiction. See also *Dunn* v. *Clarke*, 8 Peters 1; and *Kendall* v. *Winsor*, 6 R. I. 453. In *Christmas* v. *Russell*, 14 Wall. 69, 80, there are some remarks which might seem to throw doubt on this view but for the very peculiar circumstances of that case. The motion for a preliminary injunction must, therefore, be dismissed.

The foregoing opinion seems to rest upon the most satisfactory grounds, which are very clearly set forth by the learned judge. There has been for many years among the profession a pretty generally prevailing opinion that an action against an officer, in tort, for misapplying process in his hands was not bringing in question the authority under which he acted, and was entirely admissible, even when the officers concerned in conflicting processes, or actions, were acting under totally independent jurisdictions. Hence, it has been held, that where the statute regulating actions against sheriffs required longer notice than in other cases, this rule will not apply to an action of tort against a sheriff, for the reason that he is not sued as sheriff, but as a wrongdoer. And this opinion is incorporated into the decisions of many of the states. And in such cases it is held there is no actual conflict in the processes. This was the ground upon which the Massachusetts court went in 14 Gray 566. But it never seemed very satisfactory, and cannot be made so by any amount of refinement. The truth is, that when suit is brought against any ministerial officer, for any act claimed to have been done in the course of the assumed discharge of the duties of his office, he should be allowed to shield himself by any defence which the law allows him, as such officer. If he holds the person or property under process of a court of competent jurisdiction, he may well claim the protection of that court to the fullest extent, not only in regard to the validity of the process, but equally as to its application. And if the attempt is to draw him into a foreign jurisdiction for his defence, it may be quite as important to his immunity that he be allowed to invoke the shield of his own jurisdiction when he is pursued as a wrongdoer by reason of the wrongful application of the process, as if it were for some alleged defect in it. The cases cited in the opinion seem to establish this most abundantly so far as the decisions of the national courts are concerned. And they seem to us entirely well founded.

The courts of the United States have, with some recent exceptions, which we have before had occasion to notice, *vide* *Watson* v. *Jones*, 11 Am. Law. Reg. N. S. 430, 452, kept carefully aloof from any intermeddling with the concurrent jurisdiction of the state courts. Thus in *Ex parte Dorr*, 3 How. 103, it is declared that no court of the United States can issue a writ of *habeas corpus* to bring up a prisoner confined under state process for any other purpose than to examine him as a witness. And the same rule was applied in the matter of *Metzger*, 5 How. 176, where the prisoner was committed to abide the order of the President of the United States, in reference to his extradition, when claimed by the French: *People* v. *Fiske*, 45 Barb. 294. That court has intended

to adhere strictly to the settled rule of the common law in regard to concurrent or co-ordinate jurisdictions, viz.: that the court or authority having first obtained possession of the subject must exclude the interference of all others: *Smith* v. *McIvor*, 9 Wheaton 532; *Shelby* v. *Bacon*, 10 How. 56.

So that where co-ordinate liens are created by judgments both in the state and Federal courts, the seizure by the sheriff gives priority to the state court lien: *Pulliam* v. *Osborne*, 17 How. 471. And the first levy upon property, whether made under state or Federal process, withdraws the property from the reach of process from the other jurisdiction: *Hagan* v. *Lucas*, 10 Pet. 400.

And where land is in the hands of the receiver of the Court of Chancery, under a proceeding to set aside a conveyance upon the ground of fraud against creditors, it is not competent for other creditors to levy upon the land: *Wiswall* v. *Sampson*, 14 How. 52. So too when the Supreme Court of the state has taken possession of the property and franchises of a corporation and ordered them sold, they cannot be taken in execution by process from the United States courts: *Fox* v. *Hempfield Ry.*, 2 Abbott's U. S. 151. And liens existing in the state courts are not suspended by proceedings in bankruptcy: *Baum* v. *Stern*, 1 So. Car. N. S. 415. So if the United States courts issue *mandamus* to the supervisors of a county to levy a tax, the state courts cannot enjoin them against obeying the mandate of the writ, notwithstanding they are exclusively state officers: *Amy* v. *Supervisors*, 11 Wall. 136. Nor will the repeal of the statute by the state, under which they are exposed to a penalty for failure to perform their duty, excuse them: Id. And where the United States courts commit the supervisors for contempt in refusing obedience to the writ, the state courts can give no relief: *Ex parte Holman*, 28 Iowa 88.

But there are some things in the proceedings of the courts, both state and national, which have sometimes the appearance of an exception to the general rules of their jurisdiction. Thus a mere ancillary proceeding in the national courts, in order to carry a judgment of that court into effect, may be had in that court without regard to the citizenship of the parties to the particular proceeding: *Reily* v. *Golding*, 10 Wall. 56; *O'Brien County* v. *Brown*, 1 Dillon 588. And a similar proceeding in a state court cannot be removed into the Circuit Court, under the Acts of Congress, notwithstanding the parties may be citizens of different states: *Bank* v. *Turnbull*, 16 Wall. 109. And the state courts have always been accustomed to discharge minors enlisted into the United States army without the knowledge or consent of the parents, a function which would seem more appropriate for the national courts: *Re Tarble*, 25 Wis. 390: *McConologue's Case*, 107 Mass. 154, where the cases are cited very extensively. But see *Commonwealth* v. *Selfridge*, 7 Phila. Reports 76; *Tarble's Case*, 13 Wall. 397, where the Wisconsin case is reversed upon the grounds stated by us, thus curing this anomaly after it had existed for a long period and received the support of the ablest state courts in the land, embracing New York, Pennsylvania and Massachusetts, Chancellor KENT forming the only dissentient from the doctrine.

We may suggest here what seemed to us a great anomaly during the war, for the state courts where there was no suspension of the regular administration of justice, to withhold the writ of *habeas corpus* in all cases, upon the ground that the national authority had suspended it. It never seemed to us that the action of the national authority, in declaring the writ of *habeas corpus* suspended, could, upon any fair and just construction, be held to extend to any but the national courts. All the other provisions of the United States Constitution having reference to the administration of justice,

whether civil or criminal, have uniformly been held to have reference exclusively to proceedings in the National courts, unless the state courts are named. These are that trials for crimes shall be by jury, Art. III., sect. 2; that prosecutions for capital or infamous crimes must be by indictment of the grand jury; or that no one shall be subject for the same offence to be twice put in jeopardy of life or limb, or compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property, without due process of law, or private property be taken for public use without just compensation, Art. V.: *Barron* v. *Mayor of Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 434. So in Art. IV. The right of exemption from unreasonable search-warrants has been held to apply exclusively to process from the Federal courts: *Smith* v. *Maryland*, 18 How 71.

We might name other provisions of the United States Constitution having exclusive reference to the national courts, such as trial by jury in civil actions, and the prohibition against requiring excessive bail. But it will not be useful to specify further. The cases just cited show very fully that all the provisions of the national Constitution which are in general terms, and refer to proceedings in courts, have reference exclusively to the national courts. The idea then that the provision for suspending the writ of *habeas corpus* by the national authority would extend to the state courts, is either entirely without foundation or else it rests upon special grounds. But the argument from the reason of the case seems to show, equally with the general authorities before cited, that this provision need form no exception. The words of the provision, Art. I. sect. 9, are: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." The public safety could only require it in such cases to preclude any interference with the movements of the public authorities, and especially the army, all which in times of war, whether from invasion or rebellion, must be of a national character. The state courts would have no jurisdiction at any time to interfere with the national authority. That could only be done by the national courts, who alone could by *habeas corpus* examine into the legality of arrests made by the national executive through the army. The effect then of the suspension of the writ would be to place the national executive and the army, for the time, above the civil authority. This was all that the national Constitution ever could have contemplated.

The conduct, then, of some of the state courts in withholding the writ of *habeas corpus* in all cases, even *ad testificandum*, for the period of four years, was certainly a pure matter of supererogation, and would have seemed ludicrous but for the grave solemnity of the crisis through which we were being hurried. There was no more law or reason why the state courts should not have continued to use the writ of *habeas corpus* in all cases coming within their legitimate jurisdiction than at any other time before or since, unless it were out of deference to the public opinion, or as evidence of patriotism. The state courts could not indeed have relieved the members of their seceding legislatures from arrest under the orders of the national Secretary of State. But there was no reason why they could not have inquired into the legality of the arrest of a party, or witness, while attending a state court, or of the detention of an infant by mere force and against his will. And still we find almost no cases of that character during the war. In *Griffin* v. *Wilcox*, 21 Ind. 370, the court denied the power of Congress to suspend the writ in state courts, and other states may have adopted similar views, but not universally, if indeed generally. But the discussion of the question of conflicting jurisdiction between the

state and national courts is bringing the profession and the courts to more perfect comprehension of the subject. How deep the error had penetrated is apparent from the dissent of Chief Justice CHASE in *Tarble's case, supra.* And the fact that the proclamation issued by the national authority suspending the writ was broad enough to reach the state courts, would be of no importance beyond the proper limits of the national authority. It could not affect courts over whose ordinary jurisdiction it had no control. I. F. R.

Board for the Determination of Contested Elections. Kentucky.

JOHN B. COCHRAN *v.* T. C. JONES.[1]

Under the Constitution of Kentucky the giving, accepting or carrying of a challenge to fight a duel, disqualifies the person so acting for any office of honor or profit under the state, besides subjecting him to such punishment as may be prescribed by law.

The disqualification and the offence against the laws are separate subjects, and the Board for the Determination of Contested Elections has jurisdiction to decide the former, without reference to a conviction for the latter in a judicial tribunal.

A challenge may be accepted orally, although it be in writing.

Where the person receiving the highest number of votes for an office is ineligible, the person receiving the next highest number is not thereby elected, but there is a failure to fill the office, and a new election must be had.

THIS was a proceeding before the Board for the Determination of Contested Elections, to contest the right of the respondent to the office of Clerk of the Court of Appeals.

At the August election of 1874, the contestant and respondent were respectively candidates for the office of Clerk of the Court of Appeals. The contestant received 53,504 votes, and the respondent received 114,348 votes, making the majority in favor of the latter of 60,844 votes, and he therefore received a certificate of election.

On September 5th 1874, the contestant served the respondent with notice, in writing, that he would contest his right to the office upon two grounds, and that he would himself claim the office.

First. That, previous to the August election, 1874, to wit, on or about the 6th of June 1869, the respondent accepted a challenge from J. Hale, a citizen of this state, to fight him in single combat a duel with deadly weapons.

Secondly. That he, the contestant, was himself entitled to the

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[1] We give place to this decision upon an interesting and happily unusual subject, though it is not the judgment of a court. It is, however, the decision of a tribunal having final jurisdiction of the subject, and which is composed in the present case of distinguished lawyers.—ED. AM. LAW REG.